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In The

Supreme Court of the United States

October Term, 1997

JUNE A. KREUZER,

Petitioner,

vs.

VIRGIL E. BROWN,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Does the First Amendment require the government to automatically consider employees whose jobs were allegedly eliminated for business reasons for other positions if politically favored individuals are automatically considered for those positions?

II. Does an employee whose job was allegedly eliminated for business reasons bear the burden of establishing the futility of seeking a position reserved for politically favored individuals?

III. Where a governmental employee raises genuine issues of material fact regarding the employer's removal or failure to rehire an employee, may the court render summary judgment in favor of the employer?

PARTIES TO THE PROCEEDING

The parties to the proceeding are those named in the caption.

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Petitioner, June A. Kreuzer ("Kreuzer"), respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at *June A. Kreuzer v. Virgil E. Brown*, 128 F.3d 359 (6th Cir. 1997) (App. A). The opinion of the district court in *Kreuzer v. Brown*, Case No. 1:92-CV-1748 (N.D. Ohio 1996) is not published (App. B).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit ("Court of Appeals") was entered on October 20, 1997. The Court of Appeals denied a timely petition for rehearing on December 22, 1997 (App. C).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND RULE INVOLVED

The First Amendment to the United States Constitution provides in relevant part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 1 of the Fourteenth Amendment to the United States Constitution provides in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Federal Rule of Civil Procedure 56(c) provides in relevant part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

STATEMENT OF THE CASE

The fundamental question in this case is whether the government has to consider employees whose jobs were allegedly eliminated for business reasons for other positions if politically favored individuals are automatically considered for those positions. In the present case, Kreuzer presented sufficient evidence to demonstrate disparate treatment by a governmental employer due to political favoritism. Nevertheless, the lower court created a presumption that Kreuzer had no entitlement to a reorganized position without filing an application even though others received automatic consideration. The court also apparently shifted the burden to Kreuzer to disprove her employer's stated reason for his actions, and weighed evidence to determine whether that court believed that she would prevail.

The court ignored the previous holdings of this Court regarding the First Amendment and the language of Rule 56(c) of the Federal Rules of Civil Procedure.

A. Factual Background to the Employment Action Against Kreuzer.

In January of 1991, George Voinovich was sworn in as Governor of the State of Ohio. On the same day, Governor Voinovich appointed Virgil E. Brown ("Brown") Executive Director of the Ohio Lottery Commission ("Commission"). Judge Moore, in her dissent, set forth the facts as follows:

> When the evidence is viewed in the light most favorable to Kreuzer, it appears that although she originally received her job at the Commission through her political connections, she performed the job quite well and received favorable performance evaluations. When the new administration came into office and Brown took control of the Lottery Commission, he held a general meeting at which he announced that some of the employees who had gotten their jobs through politics would lose them the same way. As in *Conklin*, at Kreuzer's termination meeting, Brown gave no reason for firing her other than to say "you know how these things go." There is also evidence suggesting that Brown specifically wanted Kreuzer out of the office. 470-71 (Musaro Dep.) (stating that Brown indicated he wanted to "separate" Kreuzer without mentioning reorganization). Indeed, two weeks prior to firing Kreuzer, Brown's office faxed the governor's office a letter from Brown indicating that he wanted to get rid of Kreuzer because he believed her position "requires a high degree of personal loyalty, trust,

confidence, reliance, and fidelity, and/or is authorized to act on my behalf." A reasonable jury could infer from this evidence that Brown was motivated to terminate Kreuzer because of her political affiliation.

Prior to the alleged reorganization, the Lottery Executive Account Representatives ("LEAR") Division, which handled the sales of lottery tickets, was made up of "Partners in Prosperity ("PIPs") and "Chain Account Representatives." PIPs were primarily responsible for acting as liaisons between the Commission and smaller sales agents. The Chain Account Representatives managed the recruiting, marketing, and sales problems of the large chain and franchise stores. As a PIP, Kreuzer traveled throughout the State of Ohio visiting the sales agents in order to survey their marketing efforts and offer suggestions for improving marketing to increase lottery ticket sales. When Brown took over the Commission, he wanted to shift the focus of the LEAR program to the large chain stores. To do this, Brown fired the existing PIPs or shifted them into the Chain Account Representative positions. There was no job abolishment to the extent that all of the LEAR employees that were dismissed were replaced by new LEAR employees at the same state job classification level. Some of these new LEARs were put into Chain Account Representative positions and others were hired into a position Brown created under the LEAR Division called Regional Coordinators who were responsible for servicing all agencies within a defined region.

As part of the reorganization, LEAR positions that were not filled by transferring existing

Commission employees were filled by new employees. This is significant to the extent that at one point in his deposition Brown indicated that Kreuzer was removed rather than transferred because "[w]e did not need all the people in that unit." Additionally, three new employees hired at or near the time of Kreuzer's firing all had important connections to the Republican party. Nancy Suhadolnik was the wife of a Republican state senator, with recommendations from Robert Hughes, then Chairman of the "Cuyahoga County Republican Organization [sic]," and other prominent Republicans. Yvonne Petrigac was a Republican mayor of North Olmsted, Ohio, worked on Governor Voinovich's campaign, and listed prominent Republicans as references. Finally, Richard Perk was the son of a former Republican mayor of Cleveland, Ohio, who had recommendations from the chairman of the Cuyahoga County Republican party.

Perk had a college degree and relevant experience in marketing, but there is no indication that Petrigac or Suhadolnik had any specific qualifications for the LEAR positions. Petrigac had only worked at a temporary service and kept accounts for a family business in addition to various political jobs. Suhadolnik had been an elementary school teacher for ten years. This is not to suggest that Petrigac and Suhadolnik were unqualified but merely to demonstrate that a reasonable fact finder might find that part of Brown's motivation for firing Kreuzer was to make room at the Commission for positions for Republican supporters.

> A reasonable inference that Kreuzer was fired for political reasons is all the more possible, given the testimony of Kreuzer's co-workers. One stated that when Brown fired him, Brown claimed that he did not want to fire him, but "his hands were tied" and "there are commitments out there." Another testified that Brown told him he was being fired not because of his performance but that the decision "was being made at a higher level and that [Brown] had no control over the decision." Yet another testified that he was told by Brown, some time before he was eventually fired, "[t]hey have not told me they want your job yet." Brown also allegedly asked this co-worker, shortly after he had fired another employee, "[d]oesn't he know this is how the system works?"

(App. A at 14a-16a citations to the record omitted)

Brown did not inform Kreuzer that there were other positions in the same job classification which might be available. There were no job postings of the vacancies, and there were no interviews by the Commission's personnel division of any individuals to be hired into the chain account positions. Kreuzer was never given an option to obtain one of those positions, nor were applications filed by any employee to obtain a reorganized position.

Prior to Brown informing Kreuzer that she would no longer be employed at the Commission, two identifiable Republicans had been hired and they began training a week before Kreuzer was fired. The two individuals began work the Monday after Kreuzer's last day on Friday, June 28, 1991.

Although Brown maintains that he simply believed that there were individuals who were better qualified to perform the

duties in the chain account position, he did not explain the removal of an individual who had been performing those duties for at least three years. Cynthia Easter ("Easter") had been employed in the chain accounts division from 1988 to July 11, 1991, when she was fired by Brown. On the date that Brown informed Easter that she would be removed from her position at the Commission, she asked him if she was being removed because of job performance. He responded that there were no problems with her job performance, but that he "had to make room for other people." None of the people who were later employed in chain accounts had as much experience as Easter in working with chain accounts.

In addition, Brown had informed other employees who had held the same position as Kreuzer that even though Brown did not wish to remove them, his hands were tied and there were commitments to other individuals.

B. The Proceedings Below.

On August 26, 1992, Kreuzer filed her complaint alleging that Brown fired Kreuzer from her position with the Commission due to her affiliation with the Democratic party. Kreuzer alleged that Brown's actions violated both the First and the Fourteenth Amendment to the United States Constitution. In response to Kreuzer's complaint, Brown filed a motion for judgment on the pleadings based on the defense of qualified immunity. The late District Judge Batisti denied the motion without prejudice so that the motion could be renewed after sufficient discovery was completed.

Kreuzer then filed a motion for leave to amend the complaint. The district court granted the motion. In the Amended Complaint, Kreuzer increased her demand for damages. On June 28, 1994, Judge Batisti held a pretrial

conference and scheduled the trial to begin on October 25, 1994. On September 12, 1994, Brown filed a Motion for Summary Judgment on the grounds that: (1) Kreuzer had not presented direct evidence that political party affiliation was a motivating factor in Brown's decision to fire her; and (2) Brown was immune from suit based upon qualified immunity. The parties exchanged memoranda and awaited a decision.

Due to the tragic death of Judge Batisti, the district court transferred the case to Senior Circuit Judge, Robert B. Krupansky. Each party submitted supplemental authority during the court's consideration of the motion. On January 8, 1996, Judge Krupansky granted Brown's Motion for Summary Judgment. Judge Krupansky held that the Commission had reorganized and that Kreuzer had not demonstrated that Brown's asserted motivation for terminating her was pretextual. The judge declined to rule on any other issue. On January 25, 1996, Kreuzer filed her Notice of Appeal.

Following the submission of briefs to the Court of Appeals and oral arguments, the court issued its decision on October 20, 1997, affirming the district court's decision. Circuit Judge, Karen Nelson Moore, filed a long dissent to the majority opinion. The majority decision from the Court of Appeals found that Kreuzer's claim was not actionable because she could not establish that she was entitled to one of the new PIP positions at the reorganized Commission. The court further noted that it was unlikely that Kreuzer was not transferred because two other Democrats were transferred. The majority concluded its opinion by stating, "Thus, under the circumstances of this case, Brown's failure to consider Plaintiff for one of the new positions is not an actionable personnel decision." (App. A at 9a). The court further noted that it did not reach a decision concerning Brown's arguments that he was entitled to qualified immunity. Judge Moore, in her dissenting opinion, stated:

> There exists such disagreement as to whether Kreuzer was the subject of an adverse personnel decision in violation of her First and Fourteenth Amendment rights that reasonable minds may differ as to whether Brown terminated Kreuzer due to her political affiliation.

(App. A at 12a).

Judge Moore also noted that:

> For purposes of summary judgment, Brown has not met his burden of demonstrating that he would have dismissed Kreuzer regardless of her political affiliation.

(App. A at 18a).

Importantly, Judge Moore stated:

> For a similar example, if an employer is tired of having so many women in his plant, he may wish to get rid of some women and hire more men. In order to survive summary judgment, a dismissed female employee clearly would not have to demonstrate that the employer fired every woman. She only would have to present a prima facia case that demonstrates that the adverse personnel action taken against her was based on gender. Likewise, as Kreuzer contends, she was fired and not placed in one of the new positions because of her party affiliation. Although evidence that Republicans were transferred and she was not would help her case, she need not prove that every Democrat was fired. The fact that three new positions were filled by Republicans supports an inference that Brown failed

> to transfer, promote, or rehire her because of her political affiliation.

(App. A at 20a).

Judge Moore went on to state:

> When the evidence is viewed in the light most favorable to Kreuzer, she was considered for either a transfer, promotion, or rehire, and she was rejected. The only issue then is whether the decision was motivated in part by her party affiliation.

(App. A at 21a).

Judge Moore concluded her opinion by stating:

> Viewing the entire record in the light most favorable to the plaintiff, I conclude that the evidence supports plaintiff's claims that her discharge was motivated by her political activity and that the defendant has not demonstrated that she would have been fired regardless of her political affiliation. The defendant is, therefore, not entitled to summary judgment on this key issue.

(App. A at 23a).

A timely Petition for Rehearing and Suggestion for Rehearing En Banc was filed on October 31, 1997. The Petition for Rehearing was denied on December 22, 1997 (App. C).

Majority opinion of the Court of Appeals clearly ignores the requirements of summary judgment by failing to give credibility to the circumstantial evidence presented by Kreuzer.

The majority opinion also applies an incorrect standard of requiring a complainant to rebut a governmental actors reason for violating their First Amendment right beyond a reasonable doubt.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THIS COURT'S PRIOR RULINGS REGARDING THE FIRST AMENDMENT RIGHTS OF GOVERNMENTAL EMPLOYEES.

This Court has consistently held that the First Amendment forbids government officials from taking adverse employment actions against employees for not being supporters of the political party in power, unless party affiliation is an appropriate requirement for the position involved. *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990); *Branti v. Finkel*, 445 U.S. 507 (1980); *Elrod v. Burns*, 427 U.S. 347 (1976). Although the First Amendment is not a tenure provision which protects public employees from adverse employment decisions, the First Amendment prevents the government, except in the most compelling circumstances, from wielding its power to interfere with its employee's freedom to believe and associate, or to not believe and not associate. *Rutan*, at 76. Entitlement to a position through promotion, transfer or rehire is not a prerequisite to a First Amendment claim. The issue is whether the employee has been subjected to an adverse governmental employment decision based upon the employee's political beliefs. The lower court failed to apply and accept this standard when it held that Kreuzer failed to establish a claim because she failed to demonstrate that she had affirmatively requested a position subsequent to the reorganization.

The majority held that the First Amendment does not require the government to automatically consider employees, whose jobs were eliminated for business reasons for other positions (App. A at 6a-9a). The majority then concluded that Brown's failure to consider Plaintiff for one of the new positions is not an actionable personnel decision. *Id.* Notwithstanding the specific factual support for the conclusion that Brown did consider Kreuzer for the position, the court held that an employee's failure to either: (A) file an application for the newly created position; or (B) demonstrate the futility of such a filing was fatal to any claim by Kreuzer. The application of such a test, especially under the circumstances presented in this case, creates a road map for deceit and discriminatory activity by a government employer.

The lower court accepted the argument which had been specifically rejected by this Court in *Rutan*. The lower court held that the failure to automatically consider Kreuzer for a post-reorganization position was not actionable because Kreuzer had no entitlement to automatic consideration (App. A at 8a-9a). This Court has stated, however, that the focus should not be upon entitlement to a benefit, but instead should be upon the motives for not providing the benefit. In *Rutan*, this Court held that entitlement to a specific benefit is immaterial to a First Amendment claim. Specifically, the Court stated:

> Respondents initially contend that the employee petitioners' and cross-respondents' First Amendment rights have not been infringed because they have no entitlement to promotion, transfer, or rehire. We rejected just such an argument in *Elrod*, 427 U.S., at 359-360 (plurality opinion) and 375 (Stewart, J., concurring in judgment), and *Branti*, 445 U.S., at 514-515, as both cases involved state workers who were employees at will with no legal entitlement to

continued employment. In *Perry*, 408 U.S., at 596-598, we held explicitly that the plaintiff teacher's lack of a contractual or tenure right to re-employment was immaterial to his First Amendment claim. We explained the viability of his First Amendment claim as follows:

> "For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, *there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests — especially, his interest in freedom of speech.* For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.' *Speiser v. Randall*, 357 U.S. 513, 526 [(1958)]. Such interference with constitutional rights is impermissible." *Id.* at 597 (emphasis added).

Likewise, we find the assertion here that the employee petitioners and cross-respondents had no legal entitlement to promotion, transfer, or recall beside the point.

Rutan, at 72.

In this case, the undisputed evidence indicates that no employee filed a specific application for any position subsequent to the reorganization. There was no posting of any position which would have alerted any individual that reorganized positions existed. Every individual who was considered by Brown for a reorganized position was automatically considered without the benefit of a job posting or specific application.[1] Yet, the lower court sanctioned Brown's refusal to consider Kreuzer for the position. Pursuant to the guarantees of the First Amendment, Kreuzer must have an opportunity to show that Brown's refusal was motivated by political animus.

The majority's opinion creates an absolute rule that no employee is entitled to automatic consideration for positions where there is a tendered business reason for the reorganization. However, where certain individuals are automatically considered for positions allegedly based upon their political party affiliation, the Court may not reject the employee's claim until he or she has had a full and fair opportunity to present evidence regarding the motivation behind the automatic consideration of certain employees as compared to others. Moreover, the lower court's absolute rule would allow any government employer to reorganize and sift out those employees who are not politically acceptable. Government often has legitimate reasons for administrative restructuring. Unfortunately, if the governmental employer can consider hiring only those employees who it makes aware of the reorganization, it is absolutely insulated from viable First Amendment claims.

Kreuzer's petition should be granted so that this Court may affirm and clarify its recent decisions regarding the rights of governmental employees to be free from burdens which are not

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1. Kreuzer's supervisor, Phillip DeMio, was informed at a meeting that he would be working in chain accounts, even though he had filed no application and had not been interviewed.

imposed upon other employees simply because of the employee's political party affiliation or beliefs.

II.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THIS COURT'S PRIOR RULINGS REGARDING THE BURDEN OF PROOF IN A FIRST AMENDMENT PATRONAGE CASE.

The burden of proof requirements in any case where a governmental employee alleges that an adverse employment action is the result of his or her exercise of First Amendment rights has been well-established through the decisions of this Court. This Court outlined the required burden of proof in *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977) wherein it held:

> Initially, in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that his conduct was a "substantial factor" or to put it in other words, that it was a "motivating factor" [FN2] in the board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct.

Id. at 278.

In the present case, the proper inquiry, pursuant to *Mt. Healthy*, for determining whether Kreuzer had a legitimate cause

of action is: (1) Did Kreuzer establish that she was a Democrat and that Brown knew that she was a Democrat; and (2) Did Kreuzer establish that her being a Democrat was a motivating factor in Brown's decision not to retain Kreuzer at the Commission. *Mt. Healthy, supra* at 287. If Kreuzer established these facts, then Brown was required to establish that he would have discharged her even if she was not a Democrat. The majority's opinion not only required Kreuzer to demonstrate that political considerations may have been a motivating factor in the government's decision, but created a presumption that the government's decision was based upon nondiscriminatory reasons.

The majority determined that there was no evidence in the record that Kreuzer ever applied for a position at the reorganized Commission before bringing the action. In footnote 2, the majority further suggests that Kreuzer did not present any evidence to show that the filing of an application would have been futile (App. A at 8a). Interestingly, Brown had at no time ever raised the issue that the failure to file an application had any affect upon any decision that he made regarding Kreuzer's employment. Brown certainly had the right to allege that the failure to file an application was the reason that his decisions would have been the same regardless of any political motivation. There was simply no factual support for that position.

In the present case, no one filed an application for a reorganized position, there were no job postings alerting individuals to the existence of such positions, and identifiable Republicans were already hired for the reorganized positions before Kreuzer was informed that she was being removed. Under these circumstances, a governmental employee would be required to argue that she affirmatively sought a position of which she was unaware. Consequently, there is no likelihood of a governmental employee ever successfully challenging an

employer's failure to consider the employee for a reorganized position.

The majority inexplicably raised an issue which Brown had not raised. It focused upon Kreuzer's lack of entitlement to automatic consideration for the reorganized positions. It failed to focus on Kreuzer's First Amendment entitlement to be treated the same as other individuals without regard to her political beliefs. If the Commission had posted new job positions and required individuals to pursue the same application process, the majority's decision would be based on logic. Unfortunately, the majority's rule allows a government employer to withhold employment information from a politically disfavored employee while actively recruiting and hiring a politically favored replacement. Such a rule reflects a blatant disregard for the *Rutan, Branti, Elrod,* trilogy of cases.

The burden of proof rested squarely on Brown to demonstrate that he would not have retained Kreuzer for legitimate reasons. Kreuzer presented sufficient evidence to raise the issue of Brown's motivation for not hiring or transferring Kreuzer into one of the reorganized positions. At a minimum, Kreuzer presented sufficient evidence to raise factual questions regarding the true motivation of her removal and non-consideration. At that point, pursuant to *Mt. Healthy* it was incumbent upon Brown to raise any issues in support of his position. At no time, did Brown ever suggest that Kreuzer's failure to file an application would have resulted in a different decision.

Accordingly, Kreuzer's petition should be granted so that this Court may affirm and clarify the well-established standards for the burden of proof in First Amendment patronage cases.

III.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW IS IN DIRECT VIOLATION OF RULE 56(c) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

This Court's rules state that a petition for a writ of certiorari will be granted only for compelling reasons and rarely granted when the asserted error consists of a misapplication of a properly stated rule of law. In the present case, the majority accurately stated the rules regarding motions for summary judgment. Yet, in direct contravention of those rules, the majority weighed evidence, disregarded circumstantial evidence, and required Kreuzer to go beyond demonstrating that there were genuine issues of material fact. Judge Moore, in her dissenting opinion, vigorously outlined the majority's failings. Moreover, the failure of Kreuzer to withstand a motion for summary judgment based upon the extraordinary amount of evidence presented, would essentially preclude any plaintiff from pursuing a patronage dismissal in the Sixth Circuit. Thus, this case presents a rare situation where an injustice should not be allowed to stand.

Kreuzer has never argued that the evidence presented mandates a decision in her favor without a jury trial. Kreuzer has vigorously argued that she has presented sufficient evidence to create genuine issues of material fact regarding Brown's true motivation for her removal and Brown's failure to consider her for a new position. This Court in *Waters v. Churchill*, 511 U.S. 661 (1994), held that summary judgment was not appropriate in a First Amendment case where there were two possible explanations for an employer's motive. This Court concluded that it was not up to the district court or the court of appeals to weigh the evidence. It was up to a jury or judge at trial to determine the factual question regarding the true motive for the employer's action.

In the present case, the majority disregarded all of the rules relative to summary judgment. The moving party has the burden of proving that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). The court must afford all reasonable inferences and construe the evidence in the light most favorable to the non-moving party in determining whether there are any issues of material fact. *Id.* However, the rule, by no means, authorizes a trial by affidavits. *Id.* at 255. The court must determine whether or not the evidence presents a sufficient disagreement to require submission to a jury, or whether or not the evidence is so one-sided that one party must prevail as a matter of law. *Id.* at 251-252.

This Court has stated:

> Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor. *Adickes*, 398 U.S. at 158-159, 90 S.Ct. at 1608-1609. Neither do we suggest that the trial courts should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial. *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 68 S.Ct. 1031, 92 L.Ed. 1347 (1948).

Anderson v. Liberty Lobby, Inc., at 255.

Judge Moore's dissenting opinion includes numerous facts which demonstrate the impropriety of the majority's decision.

Evidence has been presented relating to numerous issues that clearly raise factual issues regarding Brown's motivation for his actions. As Judge Moore indicates, the majority claims, in what can only be viewed as an inappropriate weighing of the evidence, that it is "unlikely" that Kreuzer was not transferred because she is a Democrat (App. A at 20a). Obviously, the standard for granting a motion for summary judgment is not whether it is unlikely that a plaintiff will prevail, but rather whether the evidence is so one-sided that the moving party must prevail as a matter of law. *Anderson v. Liberty Lobby, Inc.*, at 255. The non-moving party need only present evidence from which a jury might return a verdict in her favor. *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986); *Matsushita Elec. Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

The majority suggests that there are three possible methods by which Kreuzer could have demonstrated an infringement of her First Amendment rights. Initially, the majority suggested that Kreuzer could have shown that the reorganization was a subterfuge to remove Democrats. However, the appropriate question is whether the reorganization was used as an opportunity to remove Democrats. Taken at his word, Brown was interested in focusing on chain accounts versus smaller stores. However, Kreuzer presented evidence that Easter, an individual who had been working for nearly four years in chain accounts, was told by Brown that she was being removed not because of her job performance, but because he had to make room for other people. This evidence alone raises the issue of the legitimacy of the reorganization, that when considered with all other evidence, it is certainly sufficient to raise a factual issue regarding the legitimacy of the reorganization.

The majority further states that the reorganization would be improper if Kreuzer could demonstrate that the positions that were added or redefined as a part of the reorganization

were effectively identical to those eliminated. Kreuzer presented evidence that all of the positions were within the same state job classification, "lottery executive account representative". She further presented evidence that certain favored individuals who were performing the duties of "lottery executive account representative" were merely transferred to perform similar duties in chain accounts. In addition, Kreuzer presented evidence that in some instances, the position description and position control number did not even change when a new employee was placed in the position.

The majority also suggested that Kreuzer could prevail if she presented evidence that similarly situated employees who were affiliated with other political parties were shifted to other positions, and that the decision not to give her one of those positions was politically motivated. Kreuzer presented evidence that identifiable Republicans were hired to take her position prior to the date that she was removed. In at least two cases, Kreuzer was more qualified than the identifiable Republicans who were hired to take her position.

The majority suggested that Kreuzer would prevail if she could show the futility of filing an application with the Commission. The evidence previously discussed in this motion is certainly sufficient to raise issues of material facts regarding Kreuzer's ability to file an application.

Finally, in a case where the employer makes direct statements that individuals will be removed for political reasons, informs specific individuals that they are being removed to make room for other employees, an employee performing the very job that is supposed to be the focus of the reorganization is removed to make room for others, and identifiable Republicans are employed in positions without any notice to other individuals at the Commission or outside the Commission, it is

absolutely incredible that the district court and the majority could conclude that there is not sufficient evidence from which a jury might return a verdict in Kreuzer's favor. If this Court fails to reverse the decision of the lower court, the case of *Kreuzer v. Brown* will be the final nail in the coffin of governmental employees' First Amendment rights.

Thus, Kreuzer's petition for writ of certiorari should be granted so that this Court might correct the majority's decision.

CONCLUSION

This case presents issues of importance to all governmental employees. It is unlikely that there will be any case where the plaintiff has more direct and circumstantial evidence to support their claim than Kreuzer presented in this case. Although this evidence is not dispositive of the case, it is certainly sufficient to raise genuine issues of material fact which would prohibit the granting of summary judgment.

In addition, this Court should not allow an appellate decision to stand that applies an incorrect burden of proof in direct contravention of this Court's previous ruling. Justice requires that this matter be remanded to the district court for further proceedings.

Respectfully submitted,

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